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Defendant.

2:20-cv-0599-BHS
3:20-cv-5352-BHS

Tacoma, Washington

May 8, 2020

TR0 Hearing

1:30 p.m.

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE BENJAMIN H. SETTLE
UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Plaintiff
Joshua Freed:

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ZACHARY P. JONES
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AFTERNOON SESSION

MAY 8, 2020

THE CLERK: United States District Court is now in session, the Honorable Benjamin H. Settle presiding.

We are going on the record in Eric Crawl versus Jay Inslee and Joshua Freed versus Jay Inslee, Cause Numbers CV20-5352 and CV20-599-BHS.

Counsel, please make an appearance for the record.

MR. LAMB: Mark Lamb for Plaintiff Joshua Freed.

MR. SASSER: Hiram Sasser for Plaintiff Joshua Freed.

MR. BUTTERFIELD: Justin Butterfield for Plaintiff Joshua Freed.

MR. CROWL: Eric (inaudible).

COURT REPORTER: I did not hear the person that just spoke. This is the court reporter, Angela Nicolavo. Could you please repeat --

MR. CROWL: Yes. Eric Crawl, plaintiff.

COURT REPORTER: Thank you very much. I got it this time. Thank you.

THE COURT: Good afternoon, everyone. Thank you for appearing through this WebEx platform and coordinating with Tony Duck from our IT department, and Gretchen Craft, the in-court deputy clerk here.

My previous hearings during this period of courthouse closure have been conducted remotely through teleconference.

1 This is our first WebEx video hearing. Mr. Duck will be
2 available should we have any technical issues that arise.

3 This is a public hearing. Members of the public or press
4 may be observing the proceedings. I want to remind everyone
5 that Local Rule 78(b) prohibits the broadcast or streaming of
6 any audio or video recordings in connection with the judicial
7 proceeding except as may be authorized by either the Judicial
8 Conference of the United States or the Judicial Council of
9 the Ninth Circuit.

10 Before I hear argument, I will make a few general
11 comments. We all have been engaged in a journey through
12 territory never traveled by this generation or really any
13 other. Crushing pandemics have been part of human history
14 over the many centuries. This country experienced such a
15 devastating pandemic in 1917 and in 1918.

16 While to this point, and it is believed as we go ahead
17 living with the presence of this coronavirus, we have not,
18 and will not, see the loss of life that the country and the
19 world have had visited on it over a century ago, but never
20 has the world seen a kind of universal quarantine in the form
21 of required or advised stay-at-home orders from federal and
22 state officials.

23 The subject of this hearing then carries with it strong
24 opinions and emotions of citizens on each side of the
25 arguments that we will hear this afternoon. Everyone here, I

1 believe, reveres this country's Constitution, as I do. It is
2 within that Constitution that the third branch of government,
3 the judiciary, is charged with the responsibility of
4 resolving disputes between citizens and their government
5 when the interpretation and the application of the Bill of
6 Rights are at issue.

7 Both sides will argue that they are protecting and
8 defending the Constitution. These rights have been the
9 subject of judicial decisions since the Bill of Rights were
10 adopted 239 years ago.

11 Let's keep in mind here that the advocates on both sides
12 are acting out of a profound respect for our Constitution
13 that sets out important governmental powers and
14 responsibilities, while preserving and reserving some basic
15 civil rights to its citizens.

16 On such serious matters as those before this Court, the
17 decision made or decisions made here are not usually the last
18 word. As we have learned, there are lower courts and
19 appellate courts across the country that have been and are
20 being presented with issues nearly the same or very similar
21 to the ones before the Court. The fact that there are
22 divergent rulings only points to the complexities of a social
23 landscape not examined before in American jurisprudence.

24 On May 6, Mr. Crowl filed an Amended Complaint rendering
25 technically moot the motion for a temporary restraining

1 order, so the Court yesterday, May 7th, entered a show cause
2 order requiring the plaintiff, by nine a.m. today, to show
3 cause why the present motion for a temporary restraining
4 order is relevant.

5 The plaintiff responded yesterday asserting that the
6 defendant is, quote, "unlikely to present any other arguments
7 aside from their current arguments," end of quote.

8 The Court then entered a minute order finding that the
9 Court need not sua sponte strike the hearing and the
10 defendant would have the option to proceed since the content
11 of the new motion for temporary restraining order does not
12 alter in any significant way than the original motion.

13 Earlier today, the defendant filed his notice indicating
14 he has no objection to proceeding on the TRO motion today.
15 Mr. Crowl pointed out in his pleadings that the Court did
16 not, as he had requested, consider the motion for a temporary
17 restraining order ex parte.

18 The Court, in its 13 years, has rarely granted ex parte
19 restraining orders. In the vast majority of such cases, the
20 Court requires notice of hearing be given to the party
21 against whom the motion is seeking injunctive relief.

22 The Court viewed this matter in such a light so that the
23 defendant was given an opportunity to respond and appear,
24 which he has.

25 I will hear argument this afternoon sequentially, taking

1 Mr. Freed first, followed by counsel from the Attorney
2 General's Office. This will be followed by an argument from
3 Mr. Crowl, and then again from the Attorney General's Office.
4 None of the same arguments and response by the defendant will
5 be -- some of those arguments will be the same and need not
6 be repeated.

7 So I am prepared to begin and hear from Mr. Lamb,
8 representing Mr. Freed.

9 MR. LAMB: Good morning (sic), Your Honor. I
10 apologize that I am not on video. I had a little bit of
11 problems with that. Are you able to hear me clearly?

12 THE COURT: I am. I am able to hear you. We will
13 see how clearly.

14 MR. LAMB: Very well. Thank you.

15 THE COURT: Or we will hear how clearly.

16 MR. LAMB: Indeed. I wanted to ask the Court at the
17 beginning, out of respect for the Court's time and judicial
18 economy, do you want to hear Mr. Freed's argument presuming
19 that the answer in our (inaudible) against the Governor to
20 apply is no (inaudible) --

21 COURT REPORTER: Excuse me. This is the court
22 reporter. Mr. Lamb --

23 MR. LAMB: (Inaudible) -- because if the response is
24 yes, as we indicated in our reply brief, we will be
25 withdrawing our motion before the Court.

1 THE COURT: Who will be speaking here for the
2 Governor? May I hear from counsel for the Governor as to the
3 question of whether or not Mr. Freed's activity of engaging
4 in one-on-one Bible study in his backyard would be deemed an
5 excepted -- or exempted activity under the spiritual
6 counseling exception?

7 MR. EVEN: Your Honor, Mr. Jones will be speaking for
8 the State. I am not sure why we are not hearing from him.

9 THE COURT: All right.

10 MR. JONES: Your Honor, can you hear me?

11 THE COURT: I can hear you.

12 MR. JONES: I apologize. I was on mute, not for the
13 first time during these virtual experiences for the past few
14 months.

15 THE COURT: I appreciate that. I have had many
16 conferences over the last few weeks in which people were
17 mistakenly not on moot when they intended to be and
18 vice versa. I appreciate we are dealing in sort of new
19 territory as judges and lawyers.

20 You may proceed.

21 MR. JONES: Thank you, Your Honor. Again, for the
22 record, this is Zachary Pekelis Jones on behalf of
23 Governor Inslee.

24 Mr. Freed asks the Governor to confirm whether prayer time
25 on a one-on-one basis is the counseling exemption from the

1 stay home order. At the same time, though, Mr. Freed does
2 not seek to conduct what he understands to be religious
3 counseling. In a sense, he is trying to have it both ways.
4 From my perspective, it appears to be little more than a
5 semantic game. I don't see any (inaudible) at play. The
6 Governor's consistent guidance and --

7 COURT REPORTER: Mr. Jones, Mr. Jones, I am so sorry.
8 This is the court reporter. The connection is just really
9 garbled. It was also very garbled when Mr. Lamb spoke. I am
10 really struggling to follow exactly what you are saying. I
11 apologize for interrupting.

12 THE COURT: I also am having some difficulty. I am
13 wondering whether we should dispense with the video aspect
14 here and go strictly to teleconference, if it would -- what
15 is the most important is not whether I can see you while you
16 speak, but whether I can clearly hear you while you speak.

17 MR. JONES: My audio is through a telephone. I am
18 not sure if that would be causing the problem.

19 MR. DUCK: This is Tony from IT.

20 Mr. Jones, did you say you were through a telephone?

21 MR. JONES: Yes, I am.

22 MR. DUCK: It could be that you are on speaker so
23 your speaker is getting back into your microphone. Is there
24 any way that you can bring the phone closer to you or somehow
25 put on ear buds to go with your phone?

1 MR. JONES: I just brought the phone as close to me
2 as possible. Is it any --

3 THE COURT: He's still breaking up.

4 MR. DUCK: Yeah, it is feeding back into itself.
5 Like I said, the best thing we can do is not have you on
6 speaker phone and that would help.

7 MR. JONES: Okay. I just picked up the telephone,
8 literally. Is this any better?

9 COURT REPORTER: That is significantly better. That
10 is awkward, but clear.

11 MR. JONES: I, in this very awkward fashion, will
12 proceed. Desperate times call for desperate measures.

13 I will start at the beginning to answer Your Honor's
14 question. The short answer is, I think, yes, the activities,
15 as Mr. Freed describes them, would appear to fit the
16 religious counseling exemption to the stay home order, if,
17 that is, he wished to avail himself of that exemption. The
18 trick, of course, is that he asks the Governor to confirm
19 whether what he describes as prayer time on a one-on-one
20 basis fits the counseling exemption from the stay home order,
21 but at the same time, Mr. Freed states that he, quote, does
22 not seek to conduct what he understands to be religious
23 counseling.

24 I don't think he can have it both ways. This is perhaps
25 just a semantic game, but if it is, it is not one the

1 Governor is inclined to play. In the Governor's consistent
2 guidance, and in his most recent proclamation, he has
3 confirmed that counseling, whether religious or secular, may
4 be conducted in person where remote counseling is not
5 possible. The Governor has deliberately tried avoiding --
6 deliberately avoided, that is, defining what constitutes
7 counseling, recognizing that it may come in many forms and
8 engaged in for many different reasons and offered by a wide
9 range of professionals and individuals, including faith
10 leaders.

11 We certainly do not think that it should be so narrowly
12 defined as Mr. Freed suggests in his reply affidavit to mean,
13 quote, "the treatment of those diagnosed with disorders
14 listed in the DSM-5." People receive counseling for a wide
15 range of reasons, including what Mr. Freed describes as
16 spiritual guidance, fellowship and emotional, mental and
17 spiritual support. We would have no reason to doubt the good
18 faith of a person seeking to utilize the counseling exemption
19 for such purposes.

20 Your Honor, if I may say, it is especially hard to imagine
21 that any sort of enforcement action would be taken against a
22 person engaging in this sort of one-on-one religious
23 counseling in his back yard. If Mr. Freed chooses to
24 forebear such activity because he does not consider it
25 counseling, that is entirely a self-inflicted restriction.

1 THE COURT: I was going to ask you the question: You
2 would not expect, as a chief executive officer, your client,
3 the chief executive law enforcement officer of the state, to
4 seek out the enforcement of the stay-at-home order against
5 Mr. Freed when he is exercising his right to engage in Bible
6 study one-on-one with someone else in his own back yard?
7 That's what I hear you saying.

8 MR. JONES: That is correct, Your Honor. I may add,
9 that enforcement is primarily driven through a
10 complaint-driven process where people submit complaints
11 against various businesses. It is difficult to imagine how a
12 complaint would arise based on the activity as Mr. Freed has
13 described it.

14 Furthermore, it just doesn't seem feasible for how that
15 sort of enforcement action would take place. Of course, it
16 wouldn't be the Governor enforcing it. It would be local law
17 enforcement, the King County Sheriff, Bothell police, et
18 cetera.

19 THE COURT: Of course, I understand that. My
20 question was whether or not the chief law enforcement
21 executive officer of the state would expect local law
22 enforcement to enforce the stay-at-home order under the facts
23 as presented by Mr. Freed in the pleadings here.

24 MR. JONES: No, Your Honor.

25 THE COURT: Mr. Lamb, I will hear from you. This

1 even makes more clear the problem of whether or not his claim
2 is ripe.

3 MR. LAMB: Your Honor, this would be the response
4 that we were seeking two weeks ago when I wrote to the
5 Governor's counsel. I am relieved the Governor has affirmed
6 on the record in federal court and conceded that they do not
7 believe the stay-at-home order is enforceable against
8 Mr. Freed with respect to personal prayer, not in a
9 counseling context, not as a licensed counselor, not as a
10 professional, but as a private citizen praying and reading
11 scripture with somebody in his yard. What I heard from the
12 government -- from the Governor's counsel is they do not
13 believe that is enforceable. That is certainly our opinion
14 and, Your Honor, I would -- provided that is on the record
15 and clear to Mr. Freed, a private citizen, can pray, read the
16 Bible with another private citizen in his residence and be
17 compliant under the Governor's order, we would withdraw our
18 motion for a temporary restraining order.

19 THE COURT: Of course, with the social distancing and
20 other guidelines there.

21 MR. LAMB: Indeed, Your Honor, the same social
22 distancing guidelines that would apply to a counseling
23 session between a private counselor or religious counselor,
24 yes.

25 MR. JONES: Your Honor, may I make one statement just

1 for the record?

2 THE COURT: You may.

3 MR. JONES: As the Governor has made clear in his
4 most recent proclamation earlier this week, as well as in
5 guidance for at least a month to legislators, members of the
6 media, and others, in-person counseling is permitted, but
7 only if remote counseling is not possible. Just as the
8 Governor has not promulgated guidance specifically defining
9 what constitutes counseling, he has not promulgated guidance
10 regarding what "not possible" means in this context. He
11 trusts the individual practitioners, members of faith
12 communities to make these decisions for themselves in good
13 faith so that their needs, counseling needs, spiritual or
14 secular, can be met safely and in the context of the
15 proclamation.

16 THE COURT: All right. We will proceed, then, unless
17 there is further comments or questions concerning Freed vs
18 Inslee, to hear from Mr. Crowl.

19 MR. CROWL: Yes, Your Honor. Thank you for --
20 (connectivity disruption).

21 Sorry, we will try it --

22 I have a speech disability. I appreciate everyone's
23 patience.

24 My argument is promulgated on a series of arguments, not
25 just one argument. I believe that the Governor's order

1 violates core constitutional (inaudible) to operate under
2 (inaudible) --

3 COURT REPORTER: Mr. Crowl, this is the court
4 reporter. Mr. Crowl, I am so sorry. This is very garbled,
5 and I am really struggling to hear what you're saying. The
6 last thing I have that you said is, "The Governor's order
7 violates core constitutional," and that's the last thing that
8 I heard that you said.

9 Judge Settle, are you able to hear or am I the only one
10 having difficulty?

11 THE COURT: I am having difficulty as well.
12 Mr. Crowl has asked for our patience, and you certainly will
13 have that patience. It is still critically important that
14 both I and the court reporter and, of course, counsel for the
15 Governor, are able to clearly hear your communication. We
16 will be patient. Take as much time as you need, and go as
17 slowly as you need to go; we will certainly be patient here.

18 MR. CROWL: Thank you, Your Honor. Is this audio
19 quality any better?

20 COURT REPORTER: This is the court reporter again. I
21 apologize for continuing to interrupt. It is very, very
22 faint and garbled.

23 THE COURT: What I am going to do is ask that we
24 discontinue the video conferencing through WebEx, and we will
25 attempt to set up a telephonic-only argument here. Now, that

1 will mean that we will have to post on the docket the phone
2 number if it is going to be different than this phone number
3 in order to engage in the purely telephonic conferencing. We
4 will resume when we can do that.

5 (Recessed.)

6 THE COURT: Good afternoon, again. I am going to ask
7 that you please identify yourself on the record here.

8 MR. LAMB: Your Honor, this is Mark Lamb for
9 Plaintiff Joshua Freed.

10 MR. SASSER: Your Honor, this is Hiram Sasser for
11 Plaintiff Joshua Freed.

12 MR. BUTTERFIELD: Your Honor, this is
13 Justin Butterfield for Plaintiff Joshua Freed.

14 MR. CROWL: Eric Crowl, plaintiff.

15 MR. EVEN: This is Jeffrey Even from the Attorney
16 General's Office for Governor Inslee.

17 MR. JONES: Zachary Pekelis Jones also for
18 Governor Inslee.

19 MR. WEIDEMAN: Paul Weideman from the Attorney
20 General's Office for Governor Inslee.

21 THE COURT: All right. We will pick up where we left
22 off. We were going to hear from plaintiff, Mr. Crowl.

23 Before I proceed with that, though, I want to just have on
24 the record, I think it may be there, but make it clear on the
25 record that Mr. Freed is withdrawing his motion for temporary

1 restraining order.

2 MR. LAMB: Your Honor, that is correct. We are
3 actually drafting a motion to withdraw that with a proposed
4 order withdrawing our motion.

5 THE COURT: We may start up again here. Mr. Crowl,
6 again, speak as slowly as you need to in order for us to be
7 able to clearly hear you.

8 MR. CROWL: Thank you, Your Honor.

9 So I was saying that my Complaint actually observes
10 multiple issues that there are problems with how the
11 emergency powers have been applied, that I concede that the
12 government has the -- the state government has emergency
13 authorities by law and that that was drafted through due
14 process.

15 THE COURT: Let me interrupt you, Mr. Crowl. I'm
16 sorry. I would like you to confine your remarks to the
17 response here from the Governor with regard to standing.
18 That is, as in the previous Freed case, there is a threshold
19 question of whether or not your claim is ripe. So I want to
20 hear what activity it is that you wish to engage in that you
21 need and are seeking an order from the Court to restrain the
22 government from precluding you to engage in that specific
23 activity. There must be generally a concrete plan to engage
24 in a particular activity. That is one of the factors in the
25 *Thompson* case that was cited by the Governor.

1 MR. CROWL: Yes, Your Honor. I would like to be able
2 to have my newborn daughter baptized. I would like to be
3 able to travel to a place of sacrimony to be able to worship.
4 Currently, I tried several times to go to a church, and the
5 church is closed with a posted notice "closed by order of the
6 governor." I would like to be able to otherwise engage in
7 (inaudible) activities commensurate in the way that other
8 activities are allowed to commence with distancing, with
9 reasonable cleanliness, sanitation requirements. I would
10 like to be offered that equal opportunity to exercise
11 religious practices that I just mentioned, that could even
12 include traveling to a place in isolation to worship.

13 THE COURT: All right. Thank you. Let me hear from
14 the defendant here on this issue.

15 Mr. Jones? I am not hearing Mr. Jones or anyone else from
16 the AG's office.

17 MR. JONES: Your Honor, can you hear me now?

18 THE COURT: Yes, I can.

19 MR. JONES: Great, sorry. Second mute snafu of the
20 hearing. Hopefully three won't be the charm.

21 This is Zach Jones again on behalf of the Governor.

22 As Your Honor referenced, the *Thomas* en banc decision from
23 the Ninth Circuit, the three factors that apply to such
24 enforcement challenges as this one are, number one, whether
25 the plaintiff has articulated a concrete plan to violate the

1 law in question. Number two, whether the prosecuting
2 authorities have communicated a specific warning or threat to
3 initiate proceedings. And three, the history of past
4 prosecution or enforcement under the challenged law suggests
5 that it will be enforced against the plaintiff.

6 Mr. Crowl, neither in his Complaint nor in his motions,
7 either iteration of it, or in what you have heard today in
8 the hearing, has established any of those factors.

9 As to the concrete plan to violate the law in question, as
10 Mr. Freed just said, I would -- he says he would like to be
11 able to engage in various religious worship. Not that he has
12 a plan to do so.

13 He mentioned he tried to go to a church, but that it was
14 closed. That is insufficient because, at most, a TRO would
15 simply apply to the parties in this case. At most, it would
16 allow Mr. Crowl to engage in religious worship, but the
17 third-party church not before the Court would not, of course,
18 be bound by any order to reopen and violate the Governor's
19 stay home order. That is just the first factor of the
20 concrete plan.

21 There has been no allegation regarding a specific warning
22 to initiate proceedings on behalf of any law enforcement
23 authority, nor is there any allegation of any past
24 enforcement or prosecution under the proclamation in any way
25 that might suggest Mr. Crowl is likely to be prosecuted.

1 MR. CROWL: Your Honor, in my claim I rely on a 1983
2 claim. It references 2000dd and 2000cc of 42 U.S.C. and, in
3 fact, I am not aware of any limits on that claim other than
4 that there is a policy in effect that bars religious exercise
5 in excess or disproportionately to other land uses.

6 And I believe I have articulated a plan and that I have
7 attempted to exercise my religious freedoms, and that because
8 of the actions the government has taken prohibiting land use,
9 that I am being barred effectively from being able to worship
10 through fellowship with others in a place of worship.

11 THE COURT: All right. Can you point to, then,
12 anything else in your pleadings in your Complaint or motion
13 that addresses this question of a concrete plan or that there
14 has been any evidence that you have been threatened with
15 violating any part of this law?

16 MR. CROWL: Well, I have been threatened through
17 public announcement or proclamation. I have not been
18 specifically threatened by any specific law enforcement
19 agency or officer. As I noted in my Complaint, I shouldn't
20 be subject to being put in that kind of dangerous situation
21 should I engage in religious exercise. I shouldn't have to
22 wait to be arrested and put into, you know, a harmful
23 situation to be able to assert a claim, by asserting a claim
24 that there is in effect currently a land use regulation that
25 bars me from conducting religious exercise in a reasonable

1 way .

2 THE COURT: All right. I believe I understand your
3 argument, and it is also laid out in your pleadings. The
4 Court is prepared to rule here and a written order will
5 follow, and that is that the motion for the temporary
6 restraining order filed by Mr. Crowl is denied in that it is
7 not ripe.

8 Are there any questions here further?

9 MR. JONES: Not from the Governor.

10 THE COURT: A written order shall follow early next
11 week on Crowl versus Inslee, on this temporary restraining
12 order. If there is nothing further, the Court will be in
13 recess.

14 UNIDENTIFIED SPEAKER: Wait.

15 THE COURT: Hello.

16 MR. CROWL: Thank you, Your Honor.

17 THE COURT: Thank you, Mr. Crowl.

18 MR. JONES: Thank you, Your Honor.

19 THE COURT: Good afternoon.

20 (The proceedings adjourned.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript to the best of my ability from the WebEx and teleconference proceedings in the above-entitled matter.

/s/ Angela Nicolavo

ANGELA NICOLAVO
COURT REPORTER